

**BEFORE MICHAEL D. RILEY  
INSURANCE COMMISSIONER  
STATE OF WEST VIRGINIA**

**MITCHELL DUNN,**

**Complainant,**

**v.**

**ADMINISTRATIVE PROCEEDING NO. :12-AP-FP-02014**

**STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY,**

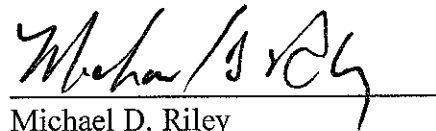
**Respondent.**

**FINAL ORDER 12-AP-FP-02014**

The undersigned, Insurance Commissioner of the State of West Virginia, does hereby adopt and approve the Recommended Decision of the Hearing Examiner, appended hereto, as well as the findings of fact and conclusions of law therein contained. It is consequently ORDERED that the consumer complaint of Mitchell Dunn against State Farm Automobile Insurance Company be, and the same are hereby, denied and dismissed.

The objections of any party aggrieved by this Order and to the Recommended Decision herein adopted is preserved.

ENTERED this 31 day of January, 2013.

  
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Michael D. Riley  
Insurance Commissioner  
State of West Virginia

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**MITCHELL DUNN,**

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**ADMINISTRATIVE PROCEEDING NO. :12-AP-FP-02014**

**STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY,**

**Respondent.**

**RECOMMENDED DECISION  
OF THE HEARING EXAMINER**

On August 1, August 28 and November 28, 2012, hearings were held before Hearing Examiner Mark W. Carbone, Esquire, at the Offices of the Insurance Commissioner. There then being present at all hearings, Complainant, Esther Gibson, and Mitchell Dunn. Present at the August 28 and November 28 hearing were Charles S. Piccirillo, Esquire, and Goldie Rhodes, Special Investigation Manager, appearing on behalf of Respondent, State Farm Mutual Automobile Insurance Co. The matter was deemed submitted for recommended decision.

*Findings of Fact*

1. On or about July 30, 2010, the Complainant<sup>1</sup> reported to the Summersville Police Department that the Complainant's vehicle (1999 Jeep Cherokee) had been damaged. The damage included the puncturing of the radiator, as well as, scratches to the body of the vehicle. This was not reported to the State Farm Insurance Company (hereinafter "State Farm" or "Respondent") until May

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<sup>1</sup>This Complaint is styled as "*Dunn v. State Farm Insurance Company*," however, Mr. Dunn is not the owner of the vehicle or an insured party. From hereon when referring to Complainant, the reference is to Esther Gibson or her mother, Ms. Campbell, as the insured parties.

of 2011. (Hearing Tr. I, p. 29)

2. Following the damage on July 30, 2010, the Complainant took the vehicle to JD's Auto Service for repair. JD's Auto Service replaced the radiator and thermostat. In the bill, JD's Auto Service noted that the "radiator was full of stop leak and frozen solid due to lack of antifreeze." (Hearing II, Ex. B-11)

3. On or about May 4, 2011, the Complainant again noted that fluids had been drained from the vehicle and there were scratches around the entire vehicle. Complainant also noticed a dent in the back bumper. This was reported to the Summersville Police Department. (Hearing Tr. I, p. 9)

4. The May 4, 2011, loss was reported to the Respondent on May 6, 2011, the day the damage was discovered. The Respondent immediately opened a claim file. (Hearing Tr. II, p. 23; Ex. A-7)

5. An inspection of the vehicle by State Farm estimator, Keith Groves, occurred on May 16, 2011. (Hearing Tr. II, p. 23; Ex. A-7) There was a delay in conducting the inspection due to scheduling problems with the Complainant.

6. On May 16, 2011, Mr. Groves went to JD's Auto Service to inspect the vehicle, however, the vehicle was not there. While at JD's Auto Service, Mr. Groves was told by Joey Dale (J.D.) that there had been a long-term problem with the vehicle. According to Mr. Dale, the vehicle had been losing coolant and someone had been putting water instead of antifreeze into the vehicle. (Hearing Tr. II, p. 26; Ex. A-7)

7. On May 10, 2011, State Farm advised the Complainant that they would only pay for a rental car until May 17, 2011. (Hearing Tr. II, p. 26; Ex. A-7)

8. On May 19, 2011, the vehicle was towed to JD's Auto Service where it was inspected by Keith Groves. (Hearing II, pp. 29-30) During the inspection, Mr. Groves was provided with Hearing II, Exhibit B-11, a report which indicated that the vehicle was full of stop leak and that it had been frozen due to the lack of antifreeze. (Hearing Tr. 11, Ex. A-7)

9. On May 27, 2011, the Respondent sent a letter to the Complainant providing payment in the amount of \$2,693.63 for the repair of the scratches to the paint. (Hearing Tr. II, p. 31; Ex. A-3) Included in that letter was an offer to provide the names of companies in her area that would do the paint job for the amount offered. Mr. Dunn testified that he had three estimates for the repair of the paint and all were in excess of the amount offered by State Farm. However, he did not place those estimates into evidence. (Hearing Tr. I, p. 32)

10. On May 26, 2011, State Farm determined that the damage to the Complainant's engine was not vandalism, but was due to the age of the vehicle and normal wear and tear. Mr. Dunn, on behalf of the Complainant, objected to State Farm's decision to disallow payment for engine damage. (Hearing Tr. II, Ex. A-7)

11. Due to the dispute as to the cause of the damage to the engine and the fact that the Complainant was making a claim for the July 30, 2010, incident, a new claim file was opened by the Respondent on May 31, 2011. (Hearing Tr. II, p. 34; Ex. B-13)

12. On or about June 1, 2011, a letter was sent to the Complainant wherein State Farm stated they would agree to the engine being torn down in order to determine the cause of the engine problem. However, if it was determined that the damage was due to normal wear and tear, the Complainant would have to pay for the tear down. If the damage was related to vandalism, the Respondent would pay the cost of the tear down. (Hearing Tr. II, p. 35; Ex. B-1)

13. The car was transported to Aqua Riders where the engine was torn down for inspection. Mr. Dunn objected to the fact that he was not present when this occurred. (Hearing Tr. I, p. 20; Hearing Tr. II, p. 36)

14. On or about July 25, 2011, an estimator with State Farm inspected the torn down engine and determined the damage was due to wear and tear. (Hearing Tr. II, p. 37; Ex. B-13)

15. Mr. Jacques of Aqua Riders, however, found that sugar was present inside one of the valve covers. (Hearing Tr. II, p. 37)

16. Mr. Dunn, on behalf of the Complainants, objected to the findings of the estimator since sugar was found inside a valve cover. The matter was then referred to State Farm's Field Special Investigation Unit. The Special Investigation Unit retained Mr. Cummings of Cummings Engine Analysis, an independent entity, to inspect the torn down engine.<sup>2</sup> (Hearing Tr. II, p. 38)

17. On August 3, 2011, Mr. Cummings concluded that the engine had a melted piston, bad bearings and bad rings which were due to overheating. Mr. Cummings did find sugar in the cylinder heads. He concluded that the sugar did not cause the engine failure, therefore the alleged vandalism was not the cause of the car's mechanical problems. (Hearing Tr. II, p. 38; Ex. B-13 & B-17)

18. The Complainant disagreed with Mr. Cummings analysis. Mr. Dunn, who is not a mechanic,<sup>3</sup> stated that it was not possible to have only one piston damaged due to wear and tear. The Complainant did not have any mechanic testify on her behalf.

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<sup>2</sup>Cummings is an independent mechanic and is not employed by State Farm.

<sup>3</sup>Mr. Dunn testified that he had been around cars all of his life and several members of his family were mechanics.

19. On or about August 3, 2011, State Farm denied the Complainant's claim as to vandalism as the cause of the damage to the vehicles's engine. (Hearing Tr. II, p. 40)

20. On August 12, 2011, Mr. Dunn filed a complaint with the West Virginia Offices of the Insurance Commissioner.

### Issue

Whether State Farm violated the Unfair Claim Practice Act by denying coverage for the alleged vandalism of the Complainant's vehicle.

### Analysis

This case had an unusual procedural history. The first hearing was scheduled for August 1, 2012. While State Farm had received the Notice of Hearing, they were under the impression that the matter had been settled, so no one from State Farm appeared at the hearing. During that first hearing, Mr. Mitchell Dunn presented the case on behalf of the Complainants, Ms. Gibson and Ms. Campbell. Ms. Gibson was present at the hearing. The Hearing Examiner was under the impression that Mr. Dunn was an insured party.

The second hearing was held on August 28, 2012. At the beginning of the hearing, counsel for State Farm objected to Mr. Dunn's representation of the Complainant. The basis of the objection was that Mr. Dunn was neither an insured under the policy, a member of the insured's family nor a licensed attorney. The undersigned sustained the objection. The Complainant stated that she would like to have time to get a lawyer. The hearing was adjourned until November 28, 2012. Complainant appeared at the November 28, 2012, hearing without an

attorney. The hearing proceeded with Ms. Gibson acting as her own advocate.<sup>4</sup>

The Complainant raises two distinct issues in her argument at the hearing: the damage to the vehicles paint; and the alleged vandalism to the vehicles engine.

The first issue raised in the Complaint deals with the amount of money that State Farm paid to repair the scratched vehicle. In order to determine whether the payment for the paint job violates West Virginia Code of State Rules, we must look at § 114-14-7.3, which states:

7.3. Adjustment of partial losses. -- The following subdivisions govern the conduct of insurers in the adjustment of partial losses:

a. Insurers shall include the insured's deductible, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with the insured, unless the deductible amount has been otherwise recovered. No deduction for expenses may be made from the deductible recovery unless an outside attorney is retained to collect such recovery. The deduction may then be for only a pro rata share of the allocated loss adjustment expense;

b. If an insurer prepares an estimate of the cost of the motor vehicle repairs, such estimate shall be in an amount for which it may be reasonably expected the damage can be satisfactorily repaired. The insurer shall give a copy of the estimate to the insured and may furnish to the insured the names of one or more conveniently located repair shops that will perform the repairs for the amount tendered in settlement of the claim;

c. If the insurer intends to exercise its rights to inspect damages prior to repair, it has seven (7) working days from the date of receipt of notice of loss to inspect the insured's damaged motor vehicle at a place and time reasonably convenient to the insured. In addition, negotiations shall commence and a good faith offer of settlement shall be made within the aforesaid seven (7) day period;

d. If the insured's motor vehicle is repaired at a repair shop recommended by the insurer, for a sum estimated by the insurer as the reasonable cost to repair the vehicle, the insurer shall, at no additional cost to the claimant and within a reasonable period of time, cause the damaged vehicle to be restored

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<sup>4</sup>The evidence presented by the Complainant during the August 1, 2012, hearing is being considered in this decision, except when Mr. Dunn was acting as an advocate.

to the condition it was in prior to the loss if the repair shop it recommended does not so repair the damaged motor vehicle;

e. Deductions for betterment and/or depreciation are permitted only for parts normally subject to repair and replacement during the useful life of the insured motor vehicle. Deductions for betterment and/or depreciation are limited to an amount equal to the proportion that the expired life of the part to be repaired or replaced bears to the normal useful life of that part. Calculations for betterment, depreciation and normal useful life must be included in the insurer's claim file;

f. Deductions for previous damage or prior condition of the motor vehicle must be measurable, discernible, itemized and specified as to dollar amount, and such deductions must be detailed in the claim file;

g. The insurer must mail or hand deliver to the insured or his or her designated representative its proof of loss or payment within ten (10) working days after the insured has accepted the insurer's offer;

h. If the insurer does not perform its own physical inspection, it is nevertheless bound by all the applicable requirements of this regulation.

Specifically, West Virginia State Code Rule § 114-14-7.3(b), is applicable to the Complainant's concern about the cost of the repair for the damaged paint. State Farm calculated the payment for damages based on a survey of the costs in the area. The Complainant claimed she was unable to find a vendor to do the job for the amount paid. However, she did not produce any evidence to support this position. Even if she had produced documentation, this does not mean there was a violation of West Virginia State Code Rule § 114-14-7.3(b). In the instant matter, the Respondent offered to provide the Complainant with the names of painting companies in her area that would paint the car for the amount of the estimate; thus satisfying the requirements of West Virginia Codes of State Rules § 114-14-7.3(b).

The second and more significant alleged violation deals with the engine. The Complainant alleges that the engine was drained of all fluids and someone vandalized the engine



by placing sugar in the valve cover.

West Virginia State Code Rule 114-14-7.3(c) requires that when the Insurance Company wants an inspection, it must occur within seven days from the notice of loss. In this case the investigation was delayed to May 16, due to a scheduling problem with the Complainant, which was not the fault of the Respondent. When the inspector arrived on May 16, the car was not available, so the inspection occurred on May 19, 2011. On May 27, 2011, within seven working days of the inspection, State Farm denied coverage. Therefore, the Respondent complied with West Virginia State Code Rules § 114-14-7.3(c).

We must then determine whether the investigation complied with West Virginia State Code Rule § 114-14-6.1. It states:

6.1. Investigation of claims. - - Every insurer shall promptly conduct and diligently pursue a thorough, fair and objective investigation and may not unreasonably delay resolution by persisting in seeking information not reasonably required for or material to the resolution of a claim dispute. This section is not intended to conflict with the statutory requirements of the Medical Professional Liability Act, W. Va. Code §§55-7B-1 to 11, as the same relate to the assertion and investigation of medical professional liability claims.

During its investigation, State Farm determined that the Complainant had had problems with the fluids in the engine prior to the May 4, 2011, event. State Farm's investigator, Mr. Graves, met with Joey Dale of JD's Auto Service and learned that there had been a long term problem with the engine losing fluids. He also was advised that someone had been using water instead of antifreeze in the vehicle and at one point the engine had become frozen.

Upon learning of these facts, State Farm determined that the damage to the engine was not due to vandalism, but to normal wear and tear. The Complainant did not agree with this assessment. State Farm stated that they would agree to pay for the engine to be torn down if it

was eventually determined that the damage was due to vandalism. However, if it was determined that the damage was due to wear and tear, the Complainant would be responsible for the cost of the tear down. The Complainant agreed and the vehicle was taken to Aqua Riders. The Complainant's witness, Mr. Dunn, complained that he wasn't present when the engine was torn down. However, there was no evidence that his presence was required under the agreement.

The State Farm inspector again concluded that the damage was due to normal wear and tear. However, since Mr. Jacques at Aqua Riders had found sugar inside one of the valve covers, State Farm agreed to bring in an independent inspector to determine the cause of the damage. Mr. Cummings of Cummings Engine Analysis, concluded that the damage to the vehicle was due to overheating and not from sugar being present inside one of the valve covers.

State Farm conducted an intensive, timely and reasonable investigation into the cause of the damage to the Complainant's vehicle. Their conclusion basically was that there had been previous damage to the vehicle which was not due to vandalism. This is a reasonable conclusion based upon the facts as presented at the hearing. Therefore, there is no violation of West Virginia State Code Rules § 114-14-6.

#### Conclusions of Law

The following are made as conclusions of law:

1. State Farm based their estimate for the repair to the damage on the paint and what could be a reasonable cost, therefore there is no violation of West Virginia Code of State Rules § 114-14-7.3(b).
2. State Farm conducted its inspection within the time limits prescribed by the law, therefore there is no violation of West Virginia Code of State Rules § 114-14-7.3(c).

3. State Farm's investigation was timely, thorough and fair, therefore there is no violation of West Virginia Code of State Rules § 114-14-6.

Recommended Decision

It is recommended that the consumer complaint of Mitchell Dunn against State Farm Mutual Automobile Insurance Company be denied and dismissed.

Respectfully recommended,

  
MARK W. CARBONE  
HEARING EXAMINER

Date: January 11, 2013